

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of

FIBER TECHNOLOGIES NETWORK, L.L.C.

Petition dated January 30, 2003 for Preemption Pursuant to
Section 253 of the Communications Act.

Docket No. 03-37

Comments of Borough of Blawnox

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Dated: March 27, 2003

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COMMENTS OF BOROUGH OF BLAWNOX

AND NOW COMES Borough of Blawnox, Pennsylvania, by and through its counsel Frederick A. Polner, Esquire and Rothman Gordon, P.C. and files this its COMMENTS in the above-captioned matter. In support whereof, the following is averred:

INTRODUCTION

The Borough of Blawnox, Pennsylvania is a close-in suburb to the City of Pittsburgh. Because of its geographic location in relation to the Pittsburgh metropolitan area, routing fiber optic cable through public rights of way in the Borough of Blawnox is highly desirable for service providers wishing to service the Pittsburgh metropolitan area.

On or about February **12**, 2001, the Borough of Blawnox passed Borough Ordinance No. **529** (the "Ordinance"). The Ordinance, in part, provides that any telecommunications service provider, to whom the Ordinance applies, must submit a fee to the Borough of Blawnox for use of rights of way located in the Borough. Petitioner, Fiber Technologies

Network, Inc. (“Fibertech”), is a facilities-based competitive telecommunications provider which deploys fiber optic networks. Fibertech recently completed construction of its fiber optic network in the Pittsburgh, Pennsylvania metropolitan area, including aerial cable through the Borough of Blawnox.

Fibertech asks the Federal Communications Commission to preempt enforcement of the Ordinance under Section 253(d) of the Communications Act, 47 U.S.C. §253(d). However, preemption under §253 is not proper in this instance.

The Ordinance can only be preempted if Fibertech can establish that the Ordinance prohibits or has the effect of prohibiting Fibertech’s ability to provide an interstate or intrastate telecommunications service. As may be seen from the within Comments, however, Fibertech has fully failed to make this showing. Further, even if Fibertech has made such showing, the Ordinance is within one of the safe harbors set forth in Section 253 which sanctions the Ordinance from preemption.

ARGUMENT

A. The Commission Is Without Authority to Grant the Relief Requested by Fibertech.

By its very language, Section 253(d) grants the Commission power to determine only whether the Ordinance violates either Section 253(a) or (b).¹ Here, however, Fibertech's sole reason for asserting that enforcement **of** the Ordinance should be preempted is that the fee imposed by the Borough to manage the public rights of way is (a) not fair and reasonable compensation or (b) is not competitively neutral and nondiscriminatory. These issues, however, are not within the province of Section 253(a) or (b); are outside the scope of the Commission's review under Section 253(d); and are outside the special expertise recognized by Congress to be reposed in the Commission

In addition, these assertions are supported by the Congressional admonishment set forth at Section 253(c), which says the following:

(c) State and Local Government Authority – Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

The Commission's authority to preempt enforcement articulated in Section 253(d) simply does not extend to consideration of the Section 253(c) issues reserved to state and local government authority.

¹ Section 253(d) Preemption—If, after notice and ~~an~~ opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation or legal requirement that violates subsection (a) or (h), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

To put it another way, while the Commission does have the authority under Section 253(a)² to determine whether the Ordinance prohibits or has the effect of prohibiting the ability of Fibertech to provide interstate or intrastate telecommunications service, such determination must be based upon factors other than those set forth in Section 253(c), viz (a) whether compensation is fair and reasonable and (b) whether the ordinance is competitively neutral and nondiscriminatory.

In a nutshell, although the Commission does have the authority to preempt enforcement of a local ordinance in a proper set of circumstances, the circumstances presented by Fibertech are not those circumstances. Accordingly, the Commission has no choice but to deny the relief requested by Fibertech.

B. Fibertech ~~Has~~ Failed To Meet Its Burden Of Proof.

Under Section 253, the party who is asserting that the local statute ~~or~~ regulation should be preempted has the burden of establishing that preemption is **required**.³ Therefore, in this instance, Fibertech must establish that the Ordinance violates §253. For the reasons set forth in these Comments, Fibertech has failed to meet this burden.

C. The Ordinance Does ~~Not~~ Violate Section 253(a).

² Section 253(a) In General - No State or local statute or regulation, or other State or **local** legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

³ See *Qwest Corporation v. City of Santa Fe*, 224 F.Supp. 2d 1305 (D.N. Mex. 2002); see also *In re Petition of the State of Minnesota*, 14 FCC Rcd 21697, F.C.C.R. 99-402, P11 n. 26 (F.C.C. December 20, 1999).

Section 253 (a) provides that:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The first line of inquiry under Section 253 (a) analysis would be to determine whether or not the regulation in question prohibits the ability of any entity to provide telecommunications services, on its face. If the regulation or statute does not prohibit the ability of an entity to provide telecommunications services on its face, the Section 253(a) analysis would require an inquiry into whether the statute or regulation, although not facially prohibitive, has the effect of prohibiting an entity from providing telecommunications services.

The ordinance in question does not facially inhibit any entity from providing telecommunications services. The Ordinance simply provides a process by which an entity must comply in order to use public rights of way in the Borough of Blawnox to provide telecommunications services. The Ordinance applies equally to any entity, including Incumbent Local Exchange Carriers (hereinafter “ILECs”), who wish to utilize the public rights of way.⁴ Notwithstanding the foregoing, the Ordinance does not apply to an entity which can demonstrate the following three characteristics:

- 1) the service provided is one which is regulated by the Pennsylvania Public Utilities Commission as a public utility; and
- 2) the service provided has been authorized by a Certificate of Public Convenience issued by the Pennsylvania Public Utilities Commission; and

⁴ See Section 2.1 of the Ordinance (explaining that “...it shall be unlawful for **any Person** to...”)(emphasis added)

3) the service provided has a tariff on file with the Pennsylvania Public Utilities Commission.’

The Ordinance does not apply to a particular telecommunications service which is under the jurisdiction of the Pennsylvania Public Utilities Commission the (“PUC”), due to the fact that each such service is subject to the PUC’s regulatory requirements. In instances where the service is not under the umbrella of the PUC regulations, the Borough can exercise regulatory control over the service in order to manage rights of ways in the Borough.

In this instance, the Ordinance is applicable to Fibertech because Fibertech fails to meet the qualifications of Section 1.1 (P)(b)(2) of the Ordinance. The Ordinance has equal application to any other entity, including ILECs, who fail to meet the qualifications of Section 1.1 (P)(b)(2). Further, the Ordinance does not facially exclude any entity from providing telecommunications services. The Ordinance simply provides a process by which such entities must comply in order to provide such services. **In** light of the foregoing, the Ordinance does not, on its face, violate Section 253(a).

Additionally, the Ordinance does not *have the effect* of prohibiting any entity from providing telecommunications services. **As** discussed above, the Ordinance has equal application to all entities who wish to use the rights of way in the Borough for provision of telecommunications services. The Ordinance applies to all entities, including ILECs. Therefore, the Ordinance does not have the effect of prohibiting Fibertech or any other service provider from competing with the ILECs.

⁵ See Section 1.1 (P)(b)(2) of the Ordinance.

Fibertech urges that because the Ordinance is applicable only to those entities who do not meet the qualifications of Section 1.1 (P)(b)(2), the Ordinance inhibits the ability of entities (like Fibertech) to compete with those entities who do meet Section 1.1 (P)(b)(2).⁶ However, local regulations have been held to have the “prohibitory” effect required under Section 253 (a) where the government has “essentially unfettered discretion” to determine whether the regulatory scheme precludes any entity from providing telecommunications services.’ Further, both case law and legislative history counsel against interpreting Section 253(a) to require precise parity of treatment.⁸ Section 253(a) does not require that all aspects of a local regulation which may be burdensome be declared “prohibitive”, rather “[s]ection 253(a) speaks in terms of prohibition, not in terms of minor delays[,]...increased costs[,] and occasional inconvenience.”⁹

The Ordinance at issue here does not have the “prohibitive” effect required by Section 253 (a). The Ordinance does not vest the Borough of Blawnox with “unfettered discretion” to determine what service providers can provide telecommunications services nor does the Ordinance apply to one type of provider but not the others. The Ordinance presents a process and fee structure which is applicable to all entities (including ILECs) who wish to utilize the

⁶ See Fibertech’s Petition For Section 253 Preemption at paragraph 20.

⁷ See *Qwest Corporation v. City of Santa Fe, New Mexico*, 224 F.Supp. 2d 1305, 1316 (D.N. Mex. 2002) (citing *City of Auburn v. Qwest*, 247 F. 3d 1169, 1176).

⁸ *TGG New York v. City of White Plains*, 305 F.2d 67,76 (2nd Cir. 2002) at 80 (cert. denied) (arguing that the legislative history of Section 253 shows that franchise fees do not need to be equal and that municipalities can take into account a number of factors in determining what fees to charge); see also *City of Santa Fe* at 1316 (pointing out that the Constitution requires that local government retain sovereignty and remain independent and autonomous and that federal courts should not micromanage the operation of local governments).

⁹ *City of Santa Fe* at 1316 (citing *BellSouth v. City of Mobile*, 171 F.Supp. 2d at 1281-82 (S.D. Ala. 2001)).

rights of way in the Borough. **As** long as the process and fee structure prescribed in the Ordinance is satisfied, the entity is free to provide telecommunications services. Further, the Ordinance does not even contemplate the apportionment of different fees to different entities, as federal courts have held to be permissible.” Finally, the fact that the Ordinance may be economically burdensome on Fibertech does not make it “prohibitive” under Section 253(a). The degree to which the fee imposed by the Ordinance is burdensome is largely a matter of the internal cost structure of the service provider. The fee imposed by the Ordinance is equal for any entity to which the Ordinance is applicable. The fact that Fibertech’s particular internal cost structure makes the fee especially burdensome for Fibertech, does not render the Ordinance violative of Section 253 (a). Therefore, Fibertech has failed to meet its burden of showing that the Ordinance should be preempted under Section 253.

Finally, it should be noted that Fibertech merely traverses the Borough of Blawnox. It does not serve anyone or anything in the Borough; nor, does it have plans to do so. It merely uses public rights of way in the Borough to carry its network traffic from one location outside the Borough to another location outside the Borough. Thus, it is not essential that Fibertech even be in any of the public ways located in the Borough. **As** mentioned later within these Comments, Fibertech can utilize public rights of way in other locales or even private rights of way within the Borough of Blawnox, such as the railroad right of way which perfectly parallels its route through public rights of way located in the Borough of Blawnox. Thus, the Borough’s Ordinance neither prohibits nor has the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service.

¹⁰ *Id.*

D. Assuming, *Arguendo*, That This Matter Is Properly Before The Commission, The Ordinance Is Within The Section 253 (b) Safe Harbor

Section 253 (b) provides a “safe harbor”, which functions as an affirmative defense to preemption of the Ordinance, even if the Ordinance violates Section 253(a).¹¹ Therefore, even if the Commission finds the Ordinance to violate Section 253(a), the Ordinance cannot be preempted if it satisfies Section 253(b).

Section 253(b) allows a municipality to impose a regulation where that regulation is 1) competitively neutral, 2) consistent with Section 254 (pertaining to Universal Services), and 3) “necessary to preserve and advance the Universal Service, protect public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” Here, the Ordinance is applied equally to all service providers including ILECs who are subject to the Ordinance; and therefore, is competitively neutral. Further, the Ordinance pertains to Section 254. Finally, the Ordinance advances the Universal Service, helps to permit the Borough to manage its rights of ways where the federal or state government does not, ensures quality telecommunications services, and safeguards the rights of consumers. Thus, even if the Commission finds that the Ordinance violates Section 253(a), the Ordinance cannot be preempted because it is within the safe harbor provided by Section 253(b).

E. Assuming, *Arguendo*, That The Commission Has the Authority To Interpret Section 253 (c), The Ordinance Does Not Discriminate; The Fees Imposed Are “Competitively Neutral And Non-Discriminatory”, And Are “Fair And Reasonable”; And Thus, Meets The Requirements Of The Section 253 (c) “Safe Harbor”.

¹¹ *Bellsouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

Where the requirements of Section 253(c) are met, the regulation in question cannot be preempted even if the regulation at issue may have a prohibitive effect on an entity's ability to provide telecommunications services." To qualify **for** the Section 253(c) "safe harbor", any compensation required must be publicly disclosed and must be:

- 1) "to manage the public rights of way"; or
- 2) "to require fair and reasonable compensation from telecommunications providers"; and
- 3) "on a competitively neutral and non-discriminatory basis for use of public rights of way on a non-discriminatory basis"

(1) Management of Public Rights of Way

The Ordinance in question is a valid exercise of the Borough of Blawnox's police powers and is designed to facilitate management of the public rights of way. The Commission has articulated several activities which are within the local government's authority to manage the public rights of way.¹³ The Ordinance facilitates the Borough of Blawnox's ability to satisfy the very type of management activities which the Commission has articulated. The Ordinance is inapplicable to services under the jurisdiction and guidance of the Pennsylvania Public Utilities Commission ("PUC"). Where the PUC does not have jurisdiction and control by virtue of a particular telecommunications service converting itself to a private utility service, the Borough of Blawnox can necessarily exercise its broad police powers over such

¹² *City of Santa Fe* at 1316–1317.

¹³ *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief*, Memorandum Opinion and Order, FCC 97-331, at Paragraph 103 (rel. Sept. 19, 1997).

service, in order to effectively manage public rights of ways. Thus, the Ordinance is applicable to entities falling into the category of not being under the control of the PUC.

The legislative history of Section 253 evidences Congressional intent to preserve the police powers of the local government to manage its rights of way.¹⁴ The Borough of Blawnox has discretion, within its ascribed police powers, to determine how to effectively manage its rights of way. The Ordinance facilitates the management of its rights of way, by allowing the Borough of Blawnox to regulate service providers in instances where the PUC does not. The fee itself helps to cover costs associated with installation and maintenance of the telecommunication facilities and justly compensates the Borough for the use of its rights of way. Therefore, the Ordinance meets the Section 253(c) requirement that the local regulation relate to the “management of public rights of way.”

(2) Fair and Reasonable Compensation

Assuming, *arguendo*, that the Ordinance does not relate to the “management of public rights of way”, the Ordinance is still within the “safe harbor” of Section 253(c) if the compensation that the Ordinance requires service providers to pay is “fair and reasonable”. Courts are essentially split on what type of fees are considered “fair and reasonable”.¹⁵ Essentially, two different approaches have emerged. Some courts have adopted the “cost-recovery-model”, which basically says that fees are reasonable where they are directly related to the cost incurred by the local government for imputing and maintaining the facilities

¹⁴ See *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169,1188 (11th Cir. 2001)

¹⁵ *City of Santa Fe* at 1327.

necessary for the service provider to provide telecommunications services.¹⁶ On the other hand, some courts have adopted the “totality-of-the-circumstances” test, which encompasses a much broader set of factors for consideration” and permits the municipality to charge fees that are not directly related to actual costs but rather constitute rents **for** the use of the municipality’s rights of ways.

The “totality-of-the-circumstances” test is the most sound approach based on recent Supreme Court jurisprudence, basic Constitutional ideals, and the legislative history of Section 253. The “totality-of-the-circumstances” test harmonizes Section 253 with recent jurisprudence relating to the Tenth Amendment to the United States Constitution and the limits of Congressional power under the Commerce Clause.¹⁸ Further, the “totality-of-the-circumstances” test furthers Congressional intent, which is evidenced by the legislative history of Section 253. As discussed above, Congress clearly intended to allow local governments to exercise authority over its rights of way, pursuant to the local government’s police powers. Interpreting Section 253 (c) under the “cost-recovery-model” would contravene this principle and require a narrowing of the local government’s ability to effectively manage public rights of way. Further, if Congress had intended to limit local governments to charging only cost-based fees for use of public rights of way, in Section 253 (c) Congress would have used the word “cost” instead of the word “**compensation.**”¹⁹

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1328 (citing *Printz v. United States*, 521 U.S. 898, 935 (1997)).

¹⁹ *Id.* at 1327 (citing *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (9th Cir. 2001)).

Applying the “totality-of-the-circumstances” test, the Ordinance prescribes a fee which is “fair and reasonable.” Here the fee charged to service providers is based on the footage of the service providers equipment which is placed in the rights of way. Thus, the fee is precisely related to the amount of use contemplated, as the “totality-of-the-circumstances” test advocates. Further, because of the key geographic location of the Borough of Blawnox, and its proximate relation to the City of Pittsburgh, Blawnox is a highly desirable location for a service provider wishing to provide telecommunications services to the City of Pittsburgh and the surrounding areas. Therefore, the price a telecommunications provider is willing to pay in order to utilize the rights of way in the Borough of Blawnox is higher than those locations which are less desirable. (If a provider is of the view that the fee charged by the Borough of Blawnox is not worth the benefit of using public rights of way in the Borough, such provider is free to consider utilizing (1) public rights of way in other locales, or (2) even private rights of way (such as the railroad right of way which perfectly parallels the route of the Fibertech cable through the Borough of Blawnox.) Finally, in light of the fees being charged by other municipalities, a fee of two dollars and fifty cents (\$2.50) per linear foot is completely reasonable.²⁰ In light of the foregoing, the fee being charged under the Ordinance is “fair and reasonable”, under Section 253 (c).

(3) Competitively Neutral and Non-Discriminatory

²⁰ See e.g. Columbus, Georgia charging Lightware, LLC \$6.94 per linear foot (see pertinent language attached hereto on Exhibit A); City of Chamblee, Georgia charging Bickerstaff Imports, Inc. 1/b/a Peachtree Isuzu \$5.00 per linear foot (see pertinent language attached hereto on Exhibit A); City of Duluth Minnesota charging Interpath Communications \$3.00 per linear foot (see pertinent language attached hereto on Exhibit A); City of Corvallis, Oregon charging all providers \$2.75 per linear foot (see Ordinance 99-26 for City of Corvallis); City of Denver, Colorado charging all providers \$2.84 per linear foot (see Ordinance No. 628 Council Bill 613); City of Eugene, Oregon charging \$5.00 per linear foot (see City of Eugene Ordinance No. 20083).

The Ordinance and the fee associated therewith are applied on a competitively neutral basis. As discussed above, the Ordinance itself is applicable to any entity, including ILECs, who do not meet the exception set forth in Section 1.1 (P)(b)(2) of *the* Ordinance. Further, the fee is applied based on the linear footage of the public rights of way used by the service provider. The fee does not differ according to arbitrary factors which the Borough of Blawnox may decide to apportion. Further, as discussed above, federal courts have held that local governments do have the right to charge different fees based on a variety of factors. Here, the Borough of Blawnox is not even attempting to charge a different fee to service providers. The fee is the same for any service provider and is based on the linear footage of the public rights of way that that service provider wishes to use. The fact that one service provider individually views this cost as excessive does not make the fee itself discriminatory or not competitively neutral. Fibertech's internal cost structure or business model may cause Fibertech to view the fee as prohibitive where another service provider may not. Section 253 (c) protects local regulations where the regulation is applied on a competitively neutral and non-discriminatory basis. The fee proscribed by the Ordinance is applied equally to each entity. The fact that such a fee, in the opinion of one service provider, prevents that service provider from maintaining telecommunications facilities in the Borough of Blawnox, does not render the Ordinance itself anticompetitive or discriminatory.

In light of the reasons set forth above, the Ordinance is within the "safe harbor" set forth in Section 253 (c). Therefore, even if the Commission were to find that the Ordinance violates Section **253** (a), the Ordinance cannot be preempted. The Commission therefore must deny Fibertech's request that the Commission preempt enforcement of the Ordinance.

F. The Commission Is Not The Proper Forum to Interpret Pennsylvania State Law

Throughout its Petition for Section 253 Preemption, Fibertech argues that the Ordinance is invalid under Pennsylvania state law. The Borough fails to see the direct relevance of such an argument to any specific part of an analysis the Commission is authorized by Congress to perform under Section 253.

Fibertech's argument that the Ordinance is invalid under the laws of the State of Pennsylvania is fatally flawed. Section 253(d) states as follows:

(d) Preemption

If after notice and an opportunity for public comment, the [Federal Communications] Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, **or** legal requirement to the extent necessary to correct such violation or inconsistency.

Subsection (a) of §253 provides the basis for which the Commission is authorized to utilize the process provided in subsection (d) of §253. In other words, where the Commission determines that the state or local statute or regulation may prohibit **or** have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services (under Section 253(a)), it may then preempt enforcement of the statute or regulation under Section 253(d).

Taken together, Section 253(a) and (d) allow the Commission to determine whether the regulation or statute presents a barrier to competition in the provision of telecommunications services in the relevant state or municipality and to preempt enforcement of such statute or regulation. Nothing in the language of Section 253 gives the Commission the power **or** authority to determine whether the regulation or statute is lawful under state law. In effect, Congress has recognized the special expertise of the Commission to decide the former, not the latter. The Commission is given the authority, by Section 253, to determine whether such statute or regulation, has the effect of creating a barrier to entry. The statutory scheme presented in Section 253, however, contemplates an analysis by the Commission which begins with the assumption that the statute or regulation is valid.

Fibertech asserts that the Pennsylvania State Highway Department has jurisdiction over particular rights of ways, rather than the municipalities; and therefore, asks the Commission to undertake an analysis of the validity of the Ordinance under the laws of the State of Pennsylvania. This undertaking exceeds the authority granted to the Commission by Section 253. For purposes of the Commission's analysis of the ordinance in question hereunder, whether or not the ordinance is lawful under the laws of the State of Pennsylvania, is wholly irrelevant, for the Commission's analysis must necessarily begin with the assumption that the Ordinance is valid under state law. Further, in order to get to the Section 253 (c) or Section 253 (b) analysis (which is where Fibertech in its Petition asserts the state law argument) in the first place, the Commission would have to have first conducted the Section 253(a) analysis.²¹ It follows then that if the Commission lacks the authority to determine the validity **of** the

Ordinance under state law in terms of the Section 253(a) analysis, it cannot then do so under Section 253(c).

Even if the Commission were to deem a determination of whether the Ordinance is valid under Pennsylvania law to be relevant to its inquiry, the Ordinance is valid under Pennsylvania law. Fibertech urges that Pennsylvania case law indicates that municipalities do not have the legal right to impose rights of way fees on service providers. However, the cases cited by Fibertech have no application to the circumstance presented here. Fibertech cites *Pennsylvania Power and Light Co. v. West Mahoney Township*, 33 D&C 2d 268 (Schuylkill Co. 1963), as standing for the proposition that maintenance of rights of way are regulated by the Pennsylvania Department of Highways and not the municipality.” However, the *Pennsylvania Power* case only stands for the proposition that the Pennsylvania Department of Highways determines whether utility poles and other structures should be erected on state highways. A decision to erect poles or other structures is not at issue here. Fibertech also cites to *Bell Telephone Co. v. Bristol Township*, 54 D&C 2d 419 (Bucks Co., 1971). The *Bell Telephone* case is limited to a determination that, where the Pennsylvania Public Utilities Commission has authority over the matter in question, its authority exists to the exclusion of the municipality. In this instance, the Ordinance is consistent with the *Bell Telephone* case. The Ordinance is only applicable where the particular telecommunications service at issue is not regulated by the Pennsylvania Public Utilities Commission as a public utility. (The PUC has authority to regulate only public utility service, not private utility service.)

²¹ See *Qwest Corporation v. City of Santa Fe*, 224 F.Supp. 2d 1305, 1316 (D.N. Mex. 2002).

²² See *Fibertech’s Petition for Section 253 Preemption* at Paragraph 13.

In fact, Pennsylvania law is clear that the municipality retains broad authority with respect to regulation of public rights of way.²³ This is particularly true where, as here, neither the State of Pennsylvania or the federal government regulates the rights of way for a particular telecommunications service.²⁴ Pennsylvania courts have also recognized the right of a municipality to charge a fee for use of public rights of way.²⁵ Further, the Pennsylvania Supreme Court has held that “the streets and alleys of cities, towns, and boroughs are under the control and direction **of** the municipalities, and they have all the power over them that can lawfully exist.”²⁶

Thus, in this instance, it **is** clear that because neither the federal government nor the State of Pennsylvania (by virtue of the telecommunications service at issue being outside the jurisdiction of the PUC by being offered on an “individual case basis”) regulates that particular telecommunications service **of** Fibertech **or** other similarly situated service providers, the Borough of Blawnox retains the right to do so. Further, in the course of its regulation of Fibertech and other service providers, Pennsylvania law clearly permits the Borough of Blawnox to charge a fee for the use of public rights **of** way in the Borough.”

²³ *Borough of Scottsdale v. National Cable Television Corporation*, 476 Pa. 47 (1977) (holding that a municipality can **pass** an ordinance requiring a service provider to obtain a franchise from the municipality for use of public rights of way).

²⁴ *Id.*

²⁵ *Id.* 52 (citing *Allegheny City v. Railway*, 159 Pa. 411, 416-17 (1893)).

²⁶ *Wood v. McGrath*, 150 Pa. 451 (1892).

²⁷ *Philadelphia v. Holmes Elec. Protective Co.*, 335 Pa. 273 (1939).

F. Conclusion

The Federal Communications Commission is not a proper forum to adjudicate Fibertech's complaint. Because Fibertech's only argument regarding the Ordinance is that the fee being charged by the Borough is unfairly high, and discriminatory, the resolution of this matter is within the confines of Section 253(c), and not Section 253(a) or (b). Since Section 253 (d) does not grant the Commission authority to make determinations under Section 253(c), the Commission does not have the authority to adjudicate this dispute.

Fibertech has not met its burden or proof to show that the Ordinance violates Section 253 (a). The Ordinance has application equally to any similarly situated service provider; and thus, is not "prohibitive" on its face. Additionally, the Ordinance does not "have the effect" of prohibiting any service provider from providing services. The Ordinance simply prescribes a cost associated with doing so, for entities which are covered by the Ordinance. The service providers to which the Ordinance does not apply are those which the PUC regulates for provision of the particular service at issue. Where the PUC lacks jurisdiction and authority to regulate the particular service at issue, it is necessary and wholly within the broad police powers of the Borough of Blawnox to regulate use of public rights of way for such service. Simply because a service provider deems the fee prescribed by the Ordinance to be prohibitive does not make the Ordinance itself anti-competitive within the meaning of Section 253 (a), particularly where the fee being charged is markedly less ~~than~~ other municipalities are charging services providers.

Even if the Commission were to find that the Ordinance violates Section 253 (a), the Ordinance is within the “safe harbor” of Section 253 (b); and therefore, cannot be preempted. The Ordinance is applied on a competitively neutral basis; the ordinance is consistent with Section 254; and, the Ordinance serves the specific purposes set forth in Section 253(b).

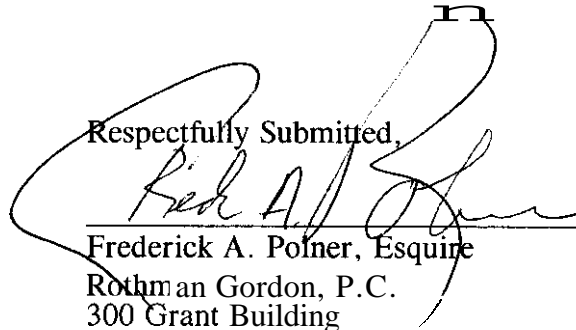
Even if the Commission were to find that the Ordinance violates Section 253 (a) and that the Ordinance is not within the Section 253(b) safe harbor, the Ordinance is within the “safe harbor” of Section 253 (c); and therefore, cannot be preempted. The Ordinance is directly related to the Borough of Blawnox’s management of the public rights of way by providing for application to entities’ provision of a particular service which is not regulated by the PUC. Further, the fee charged is “fair and reasonable”. It is applied equally to any service provider which is covered by the Ordinance (including ILECs) and is based on the actual footage of the public rights of way which the individual service provider utilizes. Further, in light of the fees other municipalities are charging service providers to utilize the rights of way of such municipalities, two dollars and fifty cents (\$2.50) per linear foot is completely reasonable. Finally, the determination by Fibertech, that this fee is not acceptable to it from a cost perspective, does not render the scheme itself anticompetitive or discriminatory.

Finally, Section 253 grants the Commission the authority to determine whether a local ordinance or regulation is anticompetitive and should be preempted. It does not vest the Commission with the authority to make determinations of whether the Ordinance is a valid exercise of the Borough’s power under state law. Rather, the Commission’s inquiry must

necessarily begin with the assumption that the Ordinance is in fact valid under state law. Lastly, even if the Commission were to deem an inquiry into the validity of the Ordinance under state law to be valid, the Ordinance is clearly within the powers vested with the Borough under Pennsylvania law.

In view of the above the Commission has no choice but to deny the relief requested by the Petitioner

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Fred A. Polner', is written over a horizontal line.

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(412) 338-1100

Counsel to Borough of Blawnox, Pennsylvania

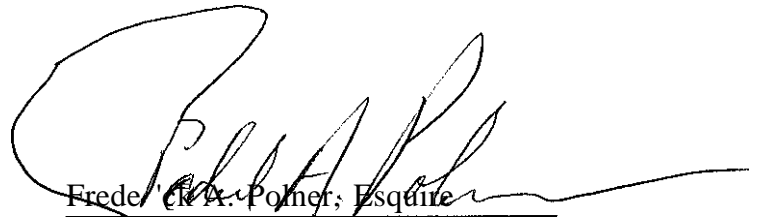
Dated: March 27, 2003

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Comments of Borough of Blawnox was sent via first class mail, postage prepaid, on the 27th day **of** March, 2003, to the following individuals:

Charles B. Stockdale, Esquire
Robert Witthauer, Esquire
Fibertech Networks
140 Allens Creek Road
Rochester, N.Y. 14618



Frederick A. Palmer, Esquire

EXHIBIT A

Agreement between the City of Columbus, Georgia and Lightwave, L.L.C

Section 3. Compensation. Licensee shall pay on an annual basis, a per linear foot charge for facilities ("Annual Per Foot Charge") (4400 feet as of the Effective Date of this Agreement) in the public right-of-way as of January 1 of each year. The first Annual Per Foot Charge shall be **\$6.94**. Thereafter the Annual Per Foot Charge shall be adjusted for each calendar year following the Base Year (as hereinafter defined) to reflect any increase in the cost of goods and services. Such adjustment to be determined as soon as practicable after January 1st of each and every year of the Term following the Base Year (hereinafter called the "Adjustment Date"). The first Adjustment Date shall be as soon as practicable after January 1, 2001. The Annual Per Foot Charge shall be adjusted on each Adjustment Date to reflect such changes, if any, as are reflected by changes in the "All Items" figures in the "Consumer Price Index - U.S. Average, All Items" (1967 = 100) of the Bureau of Labor Statistics of the United States Department of Labor. On each Adjustment Date, the adjusted Annual Per Foot Charge shall be determined by dividing \$6.94 by the index number published in the issue of the "Monthly Labor Review" for the November of the Base Year, and subsequently multiplying that amount by the index number published in the "Monthly Labor Review" for the November immediately preceding the Adjustment Date. For the purpose of this adjustment, the base year index figure shall be November 1999.

An Ordinance to authorize Bickerstaff Imports, Inc. d/b/a Peachtree Isuzu to encroach upon the public right of way in certain streets, easements and public ways in the City of Chamblee for the purpose of overhead fiber optic cable upon certain terms and conditions.

§ 3 (c) The Licensee shall pay on an annual basis a per linear foot for facilities (180 feet as of the effective date of this Ordinance) in the public right-of-way as of January 1 of each year. The first payment under this Ordinance shall be prorated from October 20, 1998 to the end of the year and shall be due within thirty (30) days from the effective date of this ordinance. Payments for each subsequent year shall be remitted by January 30. The first per linear foot charge shall be **\$5.00**, and annually thereafter the fee shall be adjusted based upon the average of the November monthly Consumer Price Index figures, relative to the United States as a whole, most recently issued by the Bureau of Labor Statistics of the United States Department of Labor. For the purpose of this adjustment, the base figure shall be the average cost-of-living index figure issued in November 1997

To authorize Interpath Communications to encroach upon the public right of way in certain streets, easements and public ways in the City of Duluth for the purpose of overhead and underground fiber optic cable upon certain terms and conditions.

§ 4 (c) The Licensee shall pay **\$3** per linear foot (5825 feet as of the Effective Date) on an annual basis for facilities in the public right-of-way as of January 1 of each year. The first

payment under this Ordinance shall be prorated from the effective date to the end of the year and shall be due within thirty (30) days from the effective date. Payments in advance for each subsequent year shall be remitted by January 30. This fee shall be adjusted annually based upon the percentage change in the Consumer Price Index (CPI).
